DePaul Law Review

Volume 9
Issue 1 *Fall-Winter 1959*

Article 19

Real Property - Negative Reciprocal Easement Held Retroactive Where Common Grantor Reacquired Lot Originally Conveyed without Restriction for Collusive Purpose - Cook v. Bandeen, 96 N.W.2d 743 (Mich., 1959)

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construe Section 17(1)(a) as incorporating by inference the more liberal 17(1)(d) test.[35]

From the foregoing, it is to be concluded that Section 17(1)(a) requires the *physical presence* of the defendant or his agent within Illinois and the transaction of the business in question at that time, "and not that he or his agent transact the business outside Illinois, or even from outside Illinois with independent persons in Illinois."[36]

[35] Ibid., at 628.

[36] Ibid., at 628.

REAL PROPERTY–NEGATIVE RECIPROCAL EASEMENT HELD RETROACTIVE WHERE COMMON GRANTOR REACQUIRED LOT ORIGINALLY CONVEYED WITHOUT RESTRICTION FOR COLLUSIVE PURPOSE

Defendant grantor conveyed one lot of his original tract to his brother without any restrictions as to the property's use. He conveyed the remaining lots within an area of two blocks of his brother's lot with restrictions that the property was to be used only for dwellings of a value of $5,000 or more. These deeds were recorded, and subsequently, the grantor's brother built a duplex valued at less than $5,000 on his lot. The grantees, whose deeds contained the restrictions, took no action to enjoin the brother from building the duplex. The brother then reconveyed the lot to the defendant, who proceeded to build a trailer camp on the property. The grantees brought this action to enjoin the grantor's activities. The chancellor decreed that the grantor was bound by reciprocal negative easements as to the entire two blocks in the original tract. On appeal to the Supreme Court of Michigan, the decree was affirmed on the ground that the grantor was estopped from showing that the reciprocal negative easements would be retroactive and, therefore, not binding on him. *Cook v. Bandeen*, 356 Mich. 328, 96 N.W.2d 743 (1959).[1]

The importance of this case lies in the unusual factual situation presented where a common grantor makes a conveyance without restrictions, followed by several conveyances with restrictions, and a reconveyance of the first lot is then made to the common grantor in the hope the property will not be subject to the reciprocal negative easements affecting the other lots.

Generally, a reciprocal negative easement arises when a common grantor conveys one lot with restrictions of benefit to all the land retained.

[1] The principal case is entitled Brownson v. Bandeen, but was consolidated with and under the title as given above.

The restrictions become mutual and the lands conveyed are subject to them.[2] As pointed out in *Allen v. Detroit*,[3] a reciprocal negative easement arises if a common grantor conveys out certain portions of his tract containing building restrictions, the restrictions becoming mutual as between the grantees and the grantor. In the *Cook* case the common grantor conveyed out several lots with a form of building restriction.

It is not important that the restrictions be enforced as between the grantor and the grantees. A reciprocal negative easement "is not personal to owners, but operative upon use of the land by any owner having actual or constructive notice thereof."[4] Constructive notice, as pointed out in *McQuade v. Wilcox*,[5] arises when the deeds containing the restrictions are recorded. Constructive notice, of course, is not an element in the instant case because the grantor, being the original formulator of the restrictions, had actual notice.

Other cases indicate that an attempt by a common grantor to establish a general scheme by inserting restrictions into the deeds of grantees results in the creation of mutual restrictions.[6] In *Silberman v. Uhrlaub*,[7] the court found a reciprocal negative easement where the common grantor attempted to establish a uniform plan of improvement, restricting the use of each parcel to residential purposes and setting forth the restrictions in the deeds.

It would appear, under these examples, that when the grantor in the *Cook* case attempted to establish a general plan for all the property within the two blocks, mutual restrictions arose as between present and future land owners. Under these facts, the grantees would be allowed to enjoin the grantor from proceeding with the trailer camp installation. The conveyance by the grantor to his brother was the first in the series of conveyances within the two blocks. This lot was not subject to any restrictions whereas the subsequent conveyances were. However, reciprocal negative easements apply only as between the common grantor, the grantees and subsequent purchasers of the restricted property.[8] In effect, the application of the restrictions, as to the lot in question, would be

[2] Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925).

[3] 167 Mich. 464, 133 N.W. 317 (1911).

[4] Sanborn v. McLean, 233 Mich. 227, 230, 206 N.W. 496, 497 (1925).

[5] 215 Mich. 302, 183 N.W. 771 (1921).

[6] Saari v. Silvers, 319 Mich. 591, 30 N.W.2d 286 (1948).

[7] 102 N.Y.S. 299 (1907).

[8] Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925); French v. White Star Refining Co., 229 Mich. 474, 201 N.W. 444 (1924); McQuade v. Wilcox, 215 Mich. 302, 183 N.W. 771 (1921); Schadt v. Brill, 173 Mich. 647, 139 N.W. 878 (1913); Boyden v. Roberts, 131 Wisc. 659, 111 N.W. 701 (1907).

retroactive and the courts have held that a reciprocal negative easement cannot by its nature be retroactive.[9]

Therefore, we are left in a position where a reciprocal negative easement exists, but should not be enforced because its application to the property would be retroactive. Thus, the grantor seemingly has a defense against the use of the mutual restrictions and can thwart the general scheme for the area.

The fact that the application of the restrictive covenants would be retroactive does not automatically preclude the grantees from a decree ordering conformity with restrictions. The defense of retroactivity may be surmounted if the doctrine of equitable estoppel applies.

It appears to be obvious from the grantor's actions that he intended to enter into a collusive scheme with his brother, the purpose being to avoid the effects of the restrictions on the original lot.

Basing its findings upon these facts, the court applied the doctrine of equitable estoppel, precluding the grantor from asserting that the restrictions, as they pertain to the original lot, would be retroactive.

Equitable estoppel is a doctrine by which a party is prevented from asserting his legal rights because he has by acts, words, or silence led another into a position where he would be prejudiced if the former were allowed to assert these rights.[10]

Unquestionably, the grantor by his own acts and words intended to deceive the grantees by making them believe that the restrictive covenants applied to all the property within the two blocks, when in fact, the grantor had a legal right which, if asserted, would exclude the lot in question from regulation under the restrictions. In *Gosnell v. Roberts*,[11] the grantor made representations to the grantee that an alley was appurtenant to the property the latter wished to purchase. When the grantor obstructed the grantee's use of the alley it was shown that the alley was not appurtenant to the grantee's property. The grantor was estopped from showing this since it was his own fraudulent and deceitful misrepresentations which led the grantee to believe the alley was appurtenant.

Reasonable reliance must be placed on the representations if the doctrine of equitable estoppel is to be applied.[12] This is not present if the party would have constructive notice that the representations were false.[13]

[9] Eveleth v. Best, 322 Mich. 637, 34 N.W.2d 504 (1948); Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925).

[10] Florida Land Inv. Co. v. Williams, 98 Fla. 1258, 116 So. 642 (1928); Wilder v. Hinckley Fibre Co., 97 Vt. 45, 122 Atl. 428 (1923).

[11] 147 Md. 625, 128 Atl. 276 (1925).

[12] Dahrooge v. Rochester-German Ins. Co., 177 Mich. 422, 143 N.W. 608 (1913).

[13] Bell v. Nye, 255 Ill. 283, 99 N.E. 610 (1912).

In *Bell v. Nye*,[14] it was shown that a grantee had constructive notice, for the purpose of denying equitable estoppel, if the conflicts as to where the title was to be situated were present in a recorded deed. As applied to the *Cook* case, the grantees would be deemed to have constructive knowledge of all the provisions in the first deed to the grantor's brother. Therefore, they would not be allowed to rely on the grantor's misrepresentations and would be precluded from applying the doctrine of equitable estoppel.

However, constructive notice is effective to deny one's right to the use of equitable estoppel only where the conduct creating the misrepresentations is mere silence. If any affirmative act or statement creates the reliance, equitable estoppel cannot be nullified by constructive notice.[15] The grantor in *Cook* was an active participant in the transactions affecting his interest and made several oral statements and overt acts to create the reliance on his misrepresentations. Equitable estoppel was not, therefore, nullified since constructive notice had no effect because the affirmative acts lead to the representations and the reliance thereon.

The lot when first conveyed out was free of any restrictions since reciprocal negative easements do not ordinarily apply retroactively. The defendant, in the position of a subsequent purchaser, could therefore use the land in any manner. However, the defendant had by his representations, induced the purchasers of other lots to buy, thinking that all the land was restricted. These representations on his part gave rise to an equitable estoppel which precluded him from asserting that the restrictions do not apply to his lot and thus, we find in effect, a reciprocal negative easement applied retroactively.

[14] Ibid.

[15] Bean v. Harris, 93 Okla. 10, 219 Pac. 300 (1923); Robbins v. Moore, 129 Ill. 30, 21 N.E. 934 (1899); Morris v. Herndon, 113 N.C. 236, 18 S.E. 203 (1893).

TORTS–DEFENSE OF ABSOLUTE PRIVILEGE HELD AVAILABLE TO OFFICERS OF THE EXECUTIVE BRANCH BELOW DEPARTMENT HEAD LEVEL

Petitioner Howard, a United State Navy Captain, was sued for allegedly false and libelous statements. The respondents were officers of the Employees Association recognized by the Navy in its Boston Naval Yard. The libelous communique was sent by Howard to various members of the Department of the Navy and to the Massachusetts congressional body. Subsequently, the libelous statements appeared in the papers. On summary judgment, the district court held for petitioner; on appeal the court of appeals remanded the case, asserting that Howard's claim of